

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SYNOPSIS REPORT

Decisions Issued in April, 2021

The Board's monthly reports are intended to assist public employers covered by a grievance procedure to monitor significant personnel-related matters which came before the Grievance Board, and to ascertain whether any personnel policies need to be reviewed, revised or enforced. W. Va. Code §18-29-11(1992). Each report contains summaries of all decisions issued during the immediately preceding month.

If you have any comments or suggestions about the monthly report, please send an e-mail to wvgb@wv.gov.

NOTICE: These synopses in no way constitute an official opinion or comment by the Grievance Board or its administrative law judges on the holdings in the cases. They are intended to serve as an information and research tool only.

TOPICAL INDEX
HIGHER EDUCATION EMPLOYEES

<u>KEYWORDS:</u>	Termination; Code of Conduct; Policy; Inappropriate Behavior; Gross Misconduct; Mitigation
<u>CASE STYLE:</u>	<u>Cumpston, et al. v. West Virginia University</u> DOCKET NO. 2020-1563-CONS (4/20/2021)
<u>PRIMARY ISSUES:</u>	Whether Respondent proved by a preponderance of evidence that Grievants committed gross misconduct justifying dismissal.
<u>SUMMARY:</u>	While employed by WVU, Grievants filmed themselves goofing around at work and posted the videos to social media. WVU dismissed Grievants after determining this negatively effected its image. WVU proved that Grievants violated policy and committed gross misconduct in disseminating the videos, thus warranting dismissal. Accordingly, this grievance is DENIED.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

KEYWORDS: Motion to Dismiss; Jurisdiction; Resignation; Hostile Work Environment; Moot; Relief

CASE STYLE: Joy v. Jefferson County Board of Education
DOCKET NO. 2020-0644-JefED (4/2/2021)

PRIMARY ISSUES: Whether this grievance is moot.

SUMMARY: Grievant took extended FMLA leave for eight months prior to the end of her employment with Respondent. She alleges she did so to cope with the stress caused by Respondent's harassment. While this grievance was pending, Grievant voluntarily resigned due to her election to Respondent's Board of Education. Grievant requests reimbursement of unpaid time used for FMLA leave and that Respondent be prohibited from harassing her as a Board member. Grievant's claim for lost wages is moot due to her voluntary resignation while her grievance was pending. Further, the Grievance Board lacks jurisdiction over a grievance from a member of Respondent Board of Education. Accordingly, this grievance is DISMISSED.

KEYWORDS: Bonus Pay; Adult Student Instructors

CASE STYLE: Luevano, et al v. Hancock County Board of Education
DOCKET NO. 2021-0052-CONS (4/30/2021)

PRIMARY ISSUES: Whether Grievants proved by a preponderance of the evidence an entitlement to the leave bonus.

SUMMARY: Grievants are employed as adult student instructors by the Hancock County Board of Education as Commercial Driver's License (CDL) Teachers at the John D. Rockefeller Career Center. Grievants seek a leave bonus of \$500 paid to classroom teachers for missing less than 4 sick and/or personal days. Grievants failed to meet their burden of proof and demonstrate by a preponderance of the evidence an entitlement to the leave bonus.

TOPICAL INDEX
STATE EMPLOYEES

<u>KEYWORDS:</u>	Motion to Dismiss; Relief; Failure to State a Claim; Advisory Opinion
<u>CASE STYLE:</u>	<u>Berger v. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital</u> DOCKET NO. 2019-0297-DHHR (4/6/2021)
<u>PRIMARY ISSUES:</u>	Whether Respondent proved that Grievant's claim does not meet the definition of a grievance and that Grievant has failed to state a claim upon which relief may be granted.
<u>SUMMARY:</u>	Grievant is employed by Respondent as an RN Nurse III. Grievant filed this grievance alleging that someone who worked in Respondent's human resources department lied to her about how her short term disability benefits worked which resulted in her having to use accrued annual leave and sick leave to cover some of an extended absence, as well as having to go without pay during some of this absence. At the heart of this grievance is a dispute between Grievant and her disability insurance company regarding coverage for the time period she was off work. Respondent has no authority to over the insurance company and no authority to determine insurance coverage. Therefore, Respondent has proved by a preponderance of the evidence that Grievant's claim does not meet the definition of a grievance, that Grievant has failed to state a claim upon which relief can be granted, and that any decision on the merits of this claim would be an advisory opinion. Accordingly, this grievance is DISMISSED.

<u>KEYWORDS:</u>	Temporary Upgrade; Qualifications; Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>Bonnett v. Workforce West Virginia/ AND Division of Personnel</u> DOCKET NO. 2020-1556-DOC (4/7/2021)
<u>PRIMARY ISSUES:</u>	Whether Grievant proved the DOP's interpretation of the minimum qualifications necessary for the temporary upgrade was clearly erroneous or arbitrary and capricious. Whether the determination Grievant did not meet the minimum qualifications was arbitrary and capricious.
<u>SUMMARY:</u>	Grievant is employed by Respondent Workforce West Virginia as an Employment Programs Specialist, Sr. Grievant grieves the Division of Personnel's rejection of her temporary upgrade to an Employment Programs Manager 2 position per its determination that Grievant did not meet the minimum qualifications of the position. Grievant failed to prove the Division of Personnel's interpretation of the minimum qualifications was clearly erroneous or that the Division of Personnel's determination Grievant did not meet the minimum qualifications was arbitrary and capricious. Accordingly, the grievance is denied.
<u>KEYWORDS:</u>	Termination; Probationary Employee; Application; Making False Statements; Background Check; Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>Dan v. Department of Health and Human Resources/Bureau for Children and Families</u> DOCKET NO. 2020-1076-DHHR (4/5/2021)
<u>PRIMARY ISSUES:</u>	Whether Respondent acted in an arbitrary and capricious manner in dismissing Grievant.
<u>SUMMARY:</u>	Grievant was hired as a probationary employee by BCF, pending a background check. Grievant was dismissed at the end of her first day when her background check revealed two misdemeanors. Grievant asserts that BCF told her to leave those misdemeanors off her application and that it would determine its course of action after completing her background check. Grievant failed to prove that her dismissal was arbitrary and capricious. Accordingly, this grievance is DENIED.

KEYWORDS: Termination; Resident Abuse; Emotional Abuse; Verbal Abuse; Neglect; Policy Violation

CASE STYLE: Greene v. Department of Health and Human Resources/Jackie Withrow Hospital
DOCKET NO. 2019-1271-CONS (4/9/2021)

PRIMARY ISSUES: Whether Respondent had good cause to terminate Grievant's employment.

SUMMARY: Respondent dismissed Grievant from employment, charging her as having engaged in abuse and neglect of a resident and violating DHHR Policy 2108, Employee Conduct. Grievant denies Respondent's allegations. Respondent proved by a preponderance of the evidence that Grievant engaged in abuse and neglect of a resident and violated the DHHR Policy 2108, Employee Conduct. Respondent proved that there was good cause for Grievant's dismissal and that such was justified. Therefore, the grievance is DENIED.

KEYWORDS: Suspension; Threatened and Embarrassed a Coworker; Policy Violation; Misconduct; Arbitrary and Capricious; Mitigation

CASE STYLE: Hackney v. General Services Division
DOCKET NO. 2020-0917-DOA (4/2/2021)

PRIMARY ISSUES: Whether Respondent proved it was justified in suspending Grievant for three days for his misconduct.

SUMMARY: Grievant is employed by Respondent as a Groundskeeper. Grievant protested a three-day suspension received for a confrontation with a coworker. Respondent proved Grievant threatened and embarrassed a coworker in violation of policy and it was justified in suspending Grievant for three days for this misconduct. Grievant failed to prove mitigation of the penalty was warranted. Accordingly, the grievance is denied.

KEYWORDS: Termination; Patient Neglect; Job Duties; Face Checks; Spot Checks; Falsifying Documents

CASE STYLE: Ruley v. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital
DOCKET NO. 2019-1633-CONS (4/13/2021)

PRIMARY ISSUES: Whether Respondent had good cause to terminate Grievant's employment.

SUMMARY: Grievant and three other workers were terminated from employment at MMBH for failing to perform required periodic checks to ensure that patients were in their rooms and not in acute distress. An investigation was conducted and concluded that Grievant and others had committed patient neglect by failing to provide the necessary and required supervision for patients in their care. Grievant was able to show that she performed one "face check" and had traded duties with another employee to perform some others. However, Respondent proved that Grievant failed to perform a required "spot check" and completed the patient check forms at the beginning of the shift rather than as the checks were conducted. This resulted in the appearance that Grievant had conducted "face checks" and a "spot check" which she had not. Grievance is denied.

KEYWORDS: Termination; Probationary Employee; Substance Abuse Policy; Breath-alcohol Test; Conformation Test; Misconduct; Arbitrary and Capricious

CASE STYLE: Winter v. Division of Highways
DOCKET NO. 2020-1541-DOT (4/1/2021)

PRIMARY ISSUES: Whether Respondent had good cause to terminate Grievant's probationary employment.

SUMMARY: Grievant is a probationary Transportation Worker employed by the Division of Highways. His job requires him to be subject to random alcohol and drug testing. Grievant was subjected to a random breath-alcohol test and the results indicated his blood-alcohol level exceeded the permitted limit. Grievant was immediately dismissed from employment based solely upon the results of the breath-alcohol test. Since Grievant was dismissed for misconduct rather than poor performance Respondent has the burden of proving the reasons for the dismissal by a preponderance of the evidence.
The evidence revealed that the blood-alcohol tests were not conducted pursuant to the required policies and procedure which renders the results invalid. Respondent did not prove the reasons for the discharge by a preponderance of the evidence.

KEYWORDS: Termination; Job Abandonment; Self-Quarantine; COVID-19; Policy Change

CASE STYLE: Ryan v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital

DOCKET NO. 2021-0039-DHHR (4/5/2021)

PRIMARY ISSUES: Whether Respondent proved by a preponderance of the evidence that Grievant engaged in job abandonment.

SUMMARY: Grievant worked at Sharpe Hospital as a Health Service Worker. Grievant was dismissed from employment following his return from annual leave for job abandonment. The record established that Grievant's failure to return to work was due to an unknown policy change concerning quarantine during the pandemic and confusion related to the Respondent's work schedule. Respondent failed to prove by a preponderance of the evidence that Grievant engaged in job abandonment. This grievance is granted.

KEYWORDS: Selection; Qualifications; Hiring Process; Seniority; Arbitrary and Capricious

CASE STYLE: Dillon, et al. v. Division of Highways

DOCKET NO. 2019-0490-CONS (4/16/2021)

PRIMARY ISSUES: Whether Grievants proved that the selection decision concerning the vacancies in question was arbitrary and capricious.

SUMMARY: Respondent posted a total of three vacancies for Transportation Worker 2 Crew Chief in two separate postings. The vacancies were for Mingo County. Grievants and six other internal and four external applicants applied for the positions. Neither Grievant was recommended nor selected for any of the vacant positions.

Grievants argue that the hiring process was improper, and their non-selection was arbitrary and capricious because they were the most qualified candidates. Both Grievants are experienced and capable employees with good employment records. However, they did not prove that any flaws occurred in the hiring process. Grievants did not prove that the reasons for selecting the successful applicants were not reasonably related to the position being filled.

KEYWORDS: Termination; Probationary Employee; Gross Misconduct; Inappropriate Conduct; Arbitrary and Capricious

CASE STYLE: English v. Department of Health and Human Resources/Bureau for Children and Families
DOCKET NO. 2020-1051-DHHR (4/23/2021)

PRIMARY ISSUES: Whether Respondent proved Grievant committed gross misconduct and that its decision to terminate Grievant's employment for the same was not arbitrary and capricious.

SUMMARY: Grievant was employed by Respondent as a probationary Economic Services Worker. Grievant's probationary employment was terminated for gross misconduct inappropriate contact with a client including the solicitation of nude photographs. Respondent proved Grievant committed gross misconduct and that its decision to terminate Grievant's employment for the same was not arbitrary and capricious. Grievant failed to prove he was entitled to more due process than that which he received post-termination. Accordingly, the grievance is denied.

KEYWORDS: Selection; Discrimination; Interview; Hiring Process; Arbitrary and Capricious

CASE STYLE: Snodgrass v. Department of Health and Human Resources/Bureau for Children and Families
DOCKET NO. 2019-1691-DHHR (4/19/2021)

PRIMARY ISSUES: Whether Grievant proved that the selection process was fatally flawed, or she was the most qualified candidate.

SUMMARY: Grievant was not selected for a vacant supervisory position she applied. She argues that Respondent discriminated against her on the basis of sex and age when a young male applicant was selected who had less experience and whose degree was not relevant to the job. She also argued that she was the most qualified candidate, and the process was flawed. Grievant proved that there were flaws in the hiring process, but the outcome would not have changed had those flaws not occurred. Respondent articulated job related reasons for selecting the successful applicant.

Grievant did not prove by a preponderance of the evidence that she was subjected to discrimination as that term is defined in the grievance procedure. Grievant did not prove by a preponderance of the evidence that the hiring process was arbitrary and capricious as a whole.